

КРИМІНАЛЬНЕ ПРАВО І КРИМІНОЛОГІЯ

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SENTENCING POLICY IN SLOVENIA (DISCREPANCY BETWEEN EXPECTATIONS AND REALITY)

The author deals with the sentencing policy in Slovenia. He believes that sentencing policy in Slovenia is too mild and for victims even offensive. The author considers in his paper a statutory penal policy, court sentencing policy and prosecutorial sentencing policy. He is in particular critical towards prosecutorial sentencing policy for which he is convinced that it leads towards the infringement of equality before the law, which is one of the most important principles of every legal system.

Keywords: Slovenia, prosecutorial sentencing policy, statutory penal policy, law

INTRODUCTION

Sentencing policy can be defined and assessed in different ways. It could be simply considered as a kind of policy, while its assessment depends on a value judgement and expectations of the estimator. Such an assessment is of course inevitably subjective. Arising from the belief that the sentence imposed should represent a just recompense to a perpetrator for the evil he caused, I cannot consider the current sentencing policy in Slovenia appropriate and fair. Sentencing policy in Slovenia is in my opinion too lenient and even offensive for victims of crime. This problem has been dealt in more detail by the philosopher, Professor Rok Svetlič, Ph.D., who pointed at an extremely high percent of probation sentences imposed in Slovenia (77 percent), which means that a victim might encounter the offender who was granted probation practically the next day in front of his house.¹

It has been known for a long time that courts in Slovenia impose sentences which are near the minimum of prescribed frame of penalty for a given criminal offence. It is simply not possible to believe that the majority of criminal offences processed by courts deserve in terms of their seriousness and dangerousness a sentence which is near the minimum sentence set out for a given criminal offence. If this was really true, it would mean that prescribed penalties are disproportionately heavy. This

presumption does not however hold true, because a comparative overview shows that prescribed penalties in Slovenia are quite comparable to the penalties in other European countries or that they are even much lighter. The argument that courts impose sentences that do not even approach the maximum of prescribed penalties, was used for reducing penalties for the majority of property offences (and also for some other) in the Penal Code entering into force in 1994 (Official Gazette of the Republic of Slovenia, no. 64/94).²

My belief that sentencing policy in Slovenia is inappropriate and too lenient, can be illustrated by the following case, told by Mitja Deisinger, LL.D.³ In the criminal proceedings against an international group of illegal drug dealers, one of the female defendants from the South America quite frankly admitted that Slovenia was chosen as a country through which illegal drugs were to come to Europe, because their lawyers (counsellors of the cartel in question) established that Slovenia had the lightest proscribed penalties for this kind of criminal offences, that Slovenian courts imposed the mildest sentences and that Slovenian prisons were compared to the prisons in some other European countries,

² More about that in: Katja Filipčič, »Kaznovalna politika v Sloveniji«, 3. Konferenca kazenskega prava in kriminologije, Zbornik 2010. Ljubljana: GV Založba in Pravna fakulteta v Ljubljani, 2010, p.16

³ In that time a judge of the Supreme Court of the Republic of Slovenia, at present a judge of the Constitutional Court of the Republic of Slovenia

¹ Rok Svetličič, »Letenje pod radarjem in kazenska politika«, Delo, 28. 2. 2012, p. 5

true »hotels« of high category. Such a statement seems to be quite a sufficient reason for harshening sentencing policies in Slovenia.

In spite of the fact that penal policy is treated in this paper as a kind of policy, it could be nevertheless defined in a more concrete way. We can make a distinction between statutory penal policy (in terms of penalties laid down in statutes) and court penal policy (sentencing policy). While a statutory penal policy consists of a deliberate prescription of penalties for criminal offences contained in a criminal code on the ground of their dangerousness for protected goods, a court sentencing policy refers to a type and severity of sentence imposed by courts on offenders for concrete criminal offences.⁴

For a more objective assessment of the adequacy of penal policy it seems reasonable to make a short analysis of both types of penal policies, their relationship and also to examine the non-reaction of state agencies in the cases, when elements required for the commission of a serious criminal offence have been fulfilled. Something has also to be said about a prosecutorial discretion regarding sentencing, which becomes increasingly important.

STATUTORY PENAL POLICY

Professor Katja Filipčič, LL.D. has considered the issue of statutory penal policy from two points of view: one is the extent of criminal offences prescribed by law and other concerns the modification of prescribed penalties. On the basis of both criteria, Filipčič has come to conclusion that penal policy in Slovenia is getting tougher.⁵ Yet, a more profound analysis indicates that neither the adding new criminal offences nor the increasing of penalties for the existing criminal offences, do not necessarily mean a real harshening of penal policy.

In order to illustrate how the introduction of the new criminalisation does not necessarily mean harsher penal policy and can even represent a *de facto* amnesty of perpetrators of certain criminal offences, we can take the most recent amendment to the Criminal Code, coming into force on May 15, 2012.⁶ This amendment contains a new criminal offence, called »Misuse of Public Funds«, which reads as follows:

⁴ Željko Horvatić, »Kaznena politika«, the entry in the book Rječnik kaznenog prava. Zagreb: Masmedia 2002, p.167

⁵ Filipčič, op. cit, pp. 15-17.

⁶ Act amending the Criminal Code (KZ-1B), Official Gazette of RS, no. 91/2011

“(1) An official, public officer or any another empowered person of the user of public funds who in ordering, acquiring, managing these funds or disposing with them knowingly violates regulations, fails to exercise necessary supervision or otherwise causes or facilitated an illegal or non purposive use of public funds although he foresees or should and could foresee that such conduct might cause a major property damage and such a damage actually occurs, shall be punished by a fine and sentenced to imprisonment for not less than three months and not more than five years.

(2) If by the perpetration of the offence referred to in the preceding paragraph a substantial damage was caused, the perpetrator shall be punished by a fine and sentenced to imprisonment for not less than one and up to eight years.

(3) The user of public funds under this Article is any legal entity of public law or its unit or any legal entity of private law or physical person, provided that it performs with these funds or on their behalf public services or any other activities in public interest or provides public goods on concession basis or any other exclusive of special rights.

(4) Public funds under this Article are immovable property, movable assets, financial means, claims, capital investments and other forms of the financial property belonging to the state, local self-government communities, European Union or to any other legal entity of public law”.

In the explanation of this article it is written: “In order to provide an efficient criminal law protection of budgetary and other public finance funds, a new criminal offence has been created – Misuse of Public Funds. It is a special form of the already existing criminal offence of Misfeasance in Office under Article 258 of the Criminal Code-1 (hereinafter CC-1), which constitutes according to its objective elements, possible perpetrators, a degree of culpability and consequences – a special act (*lex specialis*) in relation to the already existing act”. This provision, which could be seen as the harshening of penal policy, will in fact enable perpetrators of the criminal offence of Misfeasance in Office under Article 258 and the criminal offence of Abuse of Office or Official Duties under Article 257 of the CC-1⁷, to appeal to the argument that they fulfilled in fact the elements of a new criminal offence, although this one

⁷ Criminal Code KZ-1, Official Gazette of RS, nos. 55/2008, 66/2008 (amendment) and 39/2009

cannot be used against them, due to the prohibition of retroactive use of criminal code. In this way this new criminalisation will actually lead to the amnesty of perpetrators of the mentioned criminal offences, instead of making penal policy tougher.⁸

A special problem regarding penal policy is the rule on mandatory use of a more lenient law, derived from the first paragraph of Article 15 of the International Covenant on Civil and Political Rights. We are referring to the rule, well known to lawyers, according to which it is mandatory in the case, when a criminal code has been modified subsequent to the commission of a criminal offence until the final judgement and a provision is made by law for the imposition of the lighter sentence, to use a new, more lenient law. Disputability of this rule, which was by various theoreticians even further extended, can be best illustrated by the following example. Let us take, for example, two defendants who committed the same criminal offence. One would comply with a court summons and would be convicted by a final judgement, while the other would evade in different ways a court summons (by concealing himself, with escape to a foreign country, by non-acceptance of summons) and would luckily live to see the modification of the criminal code prescribing a less harsh penalty for the offences he committed. On the ground of the rule, described above, a court should use for this perpetrator a new, more lenient law, which could mean that the legal order rewards those who are able to outwit it. This is an anomaly which should be in my opinion eliminated.

The case described becomes even more disputable, if it is a question of an accomplice or an accomplice involved in the same crime. To illustrate this situation, I shall mention the case of three accomplices involved in the criminal offence of robbery (a qualified form of criminal offence). In a time when a court rendered the first instance judgement, the criminal code was altered and pursuant to the modifications set out in the new law, a different legal qualification of the act committed was introduced and consequently the imposition of a less severe sentence, different from the previous one for a couple of years. The fact that the imposition of the considerably lighter sentence on the two of the accomplices was not influenced by their personal circumstances, but was rather due to the circumstance that the new law was more lenient, indicates that not only a problem of justice is in question, but also a problem of

⁸ Professor Ivan Bele, LL.D., was the first one to call attention to this problem. For more detail see: I. Bele, »Kazenski zakonik: bomo še pravna država?«. Delo, 18. 10. 2012, p. 5

equality before the law, which is one of the most important principles of constitutional law.⁹

The increase of penalties for the already existing criminal offences either does not contribute to the harshening of penal policy. If we followed through a longer period of time criminal offences related to illicit drugs (narcotics), we would perceive a slow trend of increasing penalties, which could lead us to the conclusion that penal policy has gradually got tougher. Yet, the inactivity of prosecution agencies shows that the harshening of penal policy is only apparent. This statement can also be best illustrated by the following example. Let us take the so-called »methadone programme«. By the widely known fact that a "therapy" by methadone is not really a treatment and that methadone is a psychoactive substance which itself leads to drug addiction and is under the Regulation on the Categorization of Illicit Drugs ranged among illicit drugs (in the group II),¹⁰ it is not possible to avoid a statement that the implementation of methadone programme constitutes by itself the elements of a criminal offence of Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport under the second paragraph of Article 187 of the CC-1.¹¹ Although it is evident that carrying out a methadone programme contains

⁹ See the judgement of the District Court in Ljubljana under no. III K 39/2008 from 4. 9. 2008 and the judgement of the Higher Court in Ljubljana no. III Kp 160/2008 from 5. 2. 2009

¹⁰ Regulation on the Categorization of Illicit Drugs, Official Gazette of RS, no. 40/2000 and Regulation amending the Regulation on the Categorization of Illicit Drugs, Official Gazette of RS, nos. 42/2001, 78/2002, 53/2004, 37/2005, 122/2007, 102/2009, 95/2010, 58/2011.

¹¹ Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport, Article 187

(1) Whoever solicits another person to use narcotic drugs or illegal doping substances or provides a person with drugs to be used by him or by a third person, or whoever provides a person with a place or other facility for the use of narcotic drugs or illicit substances in sport shall be sentenced to imprisonment for not less than six months and not more than eight years.

(2) Whoever commits the offence under paragraph 1 against several persons, a minor, mentally disabled person, person with a temporary mental disturbance, severe mental retardation or person who is in the rehabilitation, or if the offence is committed in educational institutions or in immediate vicinity thereof, in prisons, military units, public places or public events, or if the offence under paragraph 1 is committed by a civil servant, priest, doctor, social worker, teacher or educator, and thereby exploits his position, shall be sentenced to imprisonment between one and twelve years.

(3) Narcotic drugs, illicit substances in sport and the tools for their consumption shall be seized.

statutory elements of the qualified form of this criminal offence for which a sentence of imprisonment between one and twelve years is provided, the prosecution agencies do not react and the state even finances this programme from its budgetary funds. A dead letter is in the same way also the third paragraph of Article 187 of the CC-1, which stipulates the mandatory seizure of illicit drugs.

A message of such a penal policy is to put it mildly, schizophrenic. What can possibly think a small marihuana dealer who is persecuted for the trafficking of a couple of "joints", while those who fulfil the elements of a qualified form of a criminal offence even enjoy a financial support from the budgetary funds. The similar applies to those forms of criminal offence that constitute in fact the assistance in consumption of illicit drugs. How can someone, who has been persecuted for providing one time a place for the use of illicit drugs, understand that those, who render opportunity for consumption of illicit drugs regularly and on the large scale, even enjoy a state support. In a similar way nobody persecutes various societies and associations which distribute to drug addicts injection needles free of charge, although it is quite clear for what purpose they will be used. Chronic patients, who have to buy by their own means syringes, do not understand quite well why syringes are distributed to drug addicts free of charge, while they have to buy them by their money in spite of a medical indication for their use.

If there are some well founded reasons for the implementation of methadone programme (if it is possible to argue professionally that the benefit of such a treatment considerably exceeds its harmful consequences), the matter should be regulated in a way to make it perfectly clear in advance when and under what conditions a conduct, containing all elements of a criminal offence, is not punishable. With the Act Amending the Criminal Code, which entered into force on May 15, 2012,¹² the Article 187 of the CC-I was complemented by the fourth paragraph, which reads as follows: "The act referred to in the first and second paragraph of this Article is not unlawful, if the offender acts in conformity with the programme of drug addiction treatment or controlled consumption of drug, which is certified in accordance with the statute and carried out in the

¹² Act Amending the Criminal Code (CC-1B), Official Gazette of RS, no. 91/2011

frame or under the supervision of the public health service." Unfortunately I am not sure that the mentioned provision represents a solution to all problems mentioned above, because it is generally known that a "therapy" by methadone is not a treatment. Besides, it is not clear to me on what ground can whatever statute, issued within the competence of public health service, certify (allow) a distribution of a psychoactive substance that leads itself to drug addiction and does not constitute any sort of treatment.

COURT SENTENCING POLICY

Professor Katja Filipčič estimates that sentencing policy of courts in Slovenia is getting tougher. Such a conclusion is made on the basis of the analysis of statistical data. She established that the number of prisoners in Slovenia had been increasing since 1990. The reason for such a situation can be attributed either to a more frequent imposition of a prison sentence or/and to the imposition of longer prison sentences. Statistical data do not however indicate a more frequent imposition of prison sentence, which means that the increase in the number of prisoners results from the imposition of longer prison sentences. Professor Filipčič presents three possible explanations for the imposition of longer prison sentences: a structure of committed criminal offences, recidivism of criminal offenders and a public opinion which is favourable to a more severe punishment. Statistical data actually indicate a rise in the rate of recidivists, while public opinion has been traditionally more inclined to a harsher punishment. Although Professor Filipčič admits that it is not possible to assess the seriousness of crimes committed only from statistical data, she nevertheless concludes that the structure of criminal offences has not changed greatly after 1990.¹³

Contrary to Professor Filipčič, I am convinced that the structure of criminal offences has considerably changed after 1990. There is an increasing number of property criminal offences with elements of violence, for example robberies with the use of firearms, resulting in deaths. A decline of social control after 1990 resulted in increased possibilities for the operation of organised criminal groups. Law enforcement agencies have already detected in Slovenia the operation of powerful foreign criminal groups, dealing with narcotic drugs,

¹³ Filipčič, *op.cit.*, pp. 17-21.

trafficking in human beings, trafficking in arms and with similar serious forms of crime. All of this makes me think that the court sentencing policy has not become more severe, but has been rather adapted to the changed structure of crime.

A special problem in Slovenia represents a failure to pay contributions, a relatively extended phenomenon, which has many faces; it takes place when companies do not pay contributions for health and social insurance for their workers, contributions for their pension and disability insurance, relatively frequent are also cases when companies do not pay salaries to their workers for several months. Although such a conduct is defined in CC-1 as a criminal

Offence¹⁴, nobody has been so far convicted for this conduct in Slovenia. In one of the rare cases resulting in charges, a court accepted the pleading of the accused, claiming that the company, due to a financial crisis, did not have money and thus could not for objective reasons comply with this obligation. The accused were acquitted and the message of this judgement is quite clear: "You can proceed with these acts, because nothing will happen to you".

In connection with this problem, Professor Ivan Bele, LL.D. remarks that the changed provision on necessity, introduced by the Act Amending the Criminal Code-1 (necessity under the new regulation does not exclude only a culpability of a perpetrator, but can exclude under certain conditions also the unlawfulness of a conduct), will cause that perpetrators of the criminal offence of Violation of Fundamental Rights of Employees will not be pursuant to the first paragraph of Article 196 of CC-I only acquitted of this criminal offence, but also acquitted of a duty to pay the prescribed contributions. That means that the provision on

¹⁴ Violation of Fundamental Rights of Employees, Article 196

(1) Whoever, to his knowledge, acts contrary to regulations governing the conclusion and termination of employment contracts, salary and compensations thereof, working time, break and rest, annual leave or absence from work, protection of women, young people and disabled persons, protection of workers due to pregnancy and parenthood, protection of older employees, prohibition of overtime or night work, or the payment of the prescribed contributions, thereby depriving or restraining an employee or job-seeker of any of his rights shall be punished by a fine or sentenced to imprisonment for not more than one year.

(2) If the act under the preceding paragraph results in unlawful termination of the employment relationship, unjustifiable non payment of three successive salaries or loss of the right that originates from unpaid contributions, the perpetrator shall be sentenced to imprisonment for not more than three years.

necessity will not provide to injured parties the same legal protection as to perpetrators. In this connection Professor Bele points out that although criminal code defines as criminal offences only those acts which are in general considered in law as unlawful, it is not authorized to declare which acts are not (or are) in accordance with law.¹⁵

PROSECUTORIAL DISCRETION REGARDING SENTENCING

A gradual renunciation of the principle of legality and giving more and more discretionary powers to public prosecutors have lead to the development of prosecutorial sentencing policy, which also deserves all attention.

The current Criminal Procedure Act (hereinafter CPA) already vests public prosecutors with large powers.¹⁶ A public prosecutor may transfer under certain conditions a crime report or a summary charge sheet to a settlement procedure¹⁷, he can suspend prosecution with the consent of the injured party¹⁸ or he is not obligated at all to initiate criminal proceedings or can abandon prosecution.¹⁹ The mentioned provisions show that a public prosecutors can exercise sentencing policy even before the case comes before a court (if a defendant complies with the instructions of a prosecutor and

¹⁵ For more detail see: Bele, op. cit., p.5

¹⁶ Criminal Procedure Act, Official Consolidated Text (ZKP-UPB 4), Official Gazette of RS, no. 32/2007; Act Amending the Criminal Procedure Act, Official Gazette of RS, nos. 66/2008; 77/2009 and 91/2011.

¹⁷ Article 161a of the CPA

(1) The public prosecutor may transfer the report of or the summary charge sheet for a criminal offence for which a fine or imprisonment of up to three years is prescribed and for criminal offences referred to in the second paragraph of this Article into the settlement procedure. In so doing, he shall take account of the type and nature of the offence, the circumstances in which it was committed, the personality of the perpetrator and his prior convictions for the same type or for other criminal offences, as well as his degree of criminal liability.

(2) If special circumstances exist, settlement may also be permitted for the criminal offences of aggravated bodily harm under the first paragraph of Article 123, grievous bodily harm under the fourth paragraph of Article 124, grand larceny under the point 1 of the first paragraph of Article 205, misappropriation under the fourth paragraph of Article 208 and damaging another's object under the second paragraph of Article 220 of the Criminal Code; if the criminal report is submitted against a minor, this may also apply to other criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

(3) Settlement shall be run by the settlement agent, who is obliged to accept the case into procedure. Settlement may be implemented only with the consent of the suspect and the injured party.

The settlement agent is independent in his work. The settlement agent shall strive to ensure that the content of the agreement is proportionate to the seriousness and consequences of the offence.

carries out tasks that he imposed on him, the case will not even be brought to court, because a crime report will be rejected by a prosecutor). These provisions are in my opinion very questionable, because they mean that a public prosecutor is vested with powers to set »sentencing frameworks« in each individual case, what represents a relatively large

(4) If the content of the agreement relates to the performance of community service, implementation of the agreement shall be organised and managed by centres for social work in collaboration with the settlement agent who ran the settlement procedure and a public prosecutor.

(5) On receiving notification of the fulfilment of the agreement, the public prosecutor shall dismiss the report. The settlement agent is also obliged to inform the public prosecutor of any failure of settlement and the reasons for such failure. The time limit for the fulfilment of the agreement may not be longer than three months.

(6) In the event of the dismissal of the report from the previous paragraph, the rights referred to in the second and fourth paragraphs of Article 60 of this Act shall not be enjoyed by the injured party, who must be informed thereof by the settlement agent before the agreement is signed.

(7) General instructions issued by the Public Prosecutor General shall define in greater detail the conditions and circumstances referred to in the first paragraph of this Article and the special circumstances referred to in the second paragraph of this Article which influence the transfer of the report to the settlement procedure.

¹⁸ Article 162 of the CPA

(1) The public prosecutor may, upon consent of the injured party, suspend prosecution of a criminal offence punishable by a fine or prison term of up to three years and of criminal offence referred to in the second paragraph of this Article if the suspect binds himself over to act as instructed by the public prosecutor and to perform certain actions to allay or remove the harmful consequences of the criminal offence. These actions may be:

- 1) elimination of or compensation for damage;
- 2) payment of a contribution to a public institution or a charity or fund for compensation for damage to victims of criminal offences;
- 3) performance of community service;
- 4) fulfilment of a maintenance obligation.

(2) If special circumstances exist, criminal prosecution may also be suspended for the criminal offences of Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport under the first paragraph of Article 187, Grand Larceny under point 1 of the first paragraph of Article 205,

Misappropriation under the fourth paragraph of Article 208, Extortion and Blackmail under the first and the second paragraphs of Article 213, Business Fraud under the first paragraph of Article 228, Damaging Another's Object under the second paragraph of Article 220, Embezzlement and Unauthorised Use of Another's Property under the first paragraph of Article 209 and the Presentation of Bad Cheques and Abuse of Bank or Credit Cards under the first and second paragraphs of Article 246 of the Criminal Code; if the criminal report is submitted against a minor, this may also apply to criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

(3) If the public prosecutor imposes the task of rectifying damage from point 1 or the task from point 3 of the first paragraph of this Article, the work shall be organised and managed by centres for social work, in collaboration with the public prosecutor.

(4) If within a time limit no longer than six months, and in respect of the obligation from the point 4 no longer than a year, the suspect fulfils the obligation undertaken, the crime report shall be dismissed.

risk for the violation of the principle of equality before the law.

The most recent Act Amending the ACP, which came into force on November 29, 2011 and has been applied since May 15, 2012, represents even a more profound intervention in this subject matter.²⁰ This amendment namely introduced the institute of guilty plea agreement or plea bargaining.

A defendant, his defence counsel and public prosecutor can propose in criminal proceedings to the injured party a conclusion of agreement about a defendant's admission of guilt for the criminal offence he committed. A conclusion of such an agreement can be made on the motion of a public prosecutor even before the beginning of proceedings, if there is a reasonable suspicion that a suspect committed the criminal offence which will be the object of proceedings. A public prosecutor, who proposes the agreement, must in this case inform a suspect in written form about a description and legal qualification of the act in regard of which he proposes the conclusion of agreement. If a suspect has not been yet interrogated, he must inform him about his rights under the fourth paragraph of Article 148 of this Act.²¹

If a motion is filed according to the first paragraph of this Article, the parties can negotiate about the conditions of admission of guilt for a criminal offence for which pre-trial or criminal proceedings are conducted against a suspect or defendant and about the content of the agreement. A public

(5) In the event of the dismissal of the report from the preceding paragraph, the injured party shall not have the rights referred to in the second and fourth paragraphs of Article 60 of this Act. The public prosecutor shall be obliged to inform the injured party of the loss of these rights before the injured party gives consent under the first paragraph of this Article.

(6) The special circumstances that have a bearing on the decision of the public prosecutor relating to the suspension of criminal prosecution shall be laid down in more detail in general instructions, issued by the State Prosecutor General.

¹⁹ Article 163 of the CPA

The public prosecutor shall not be obligated to start criminal prosecution, or shall be entitled to abandon prosecution:

1) where the Criminal Code lays down that the court may or must grant remission of penalty to a criminal offender and the public prosecutor assesses that in view of the actual circumstances of the case a sentence alone without a criminal sanction is not necessary;

2) where the Criminal Code provides for a specific offence a fine or imprisonment up to one year and the suspect or the accused, having genuinely repented of the offence, has prevented harmful consequences or compensated for damage and the public prosecutor assesses that in view of the actual circumstances of the case a criminal sanction would not be justified.

²⁰ Act Amending the Criminal Procedure Act (ZKP-K), Official Gazette of RS, no. 91/2011

²¹ The first paragraph of Article 450 a of the ACP

prosecutor can also negotiate only with a defence counsel, if a suspect or defendant gives consent to this. The plea agreement has to be concluded in a written form and has to be signed by both parties and a defence counsel. A criminal offence for which the agreement was concluded has to be described in a form which is required for the description of the act in a charge sheet (point 2 of the first paragraph of Article 269). The agreement shall be enclosed to the filed charge sheet or summary charge sheet; if the agreement is reached later, a public prosecutor has to submit it immediately to a court and the latest until the beginning of the main hearing.²²

In the agreement by which a defendant pleads guilty for all or for some of the criminal offences which are the object of the charge, a defendant and public prosecutor can agree upon the following:

1. about the penalty or admonitory sanction and the manner of the enforcement of sanction;
2. about a public prosecutor's abandonment of criminal prosecution of criminal offences which are not included in a defendant's admission of guilt;
3. about the costs of criminal proceedings;
4. about the performance of some other task.

On the other hand, there are some issues that cannot be the object of plea agreement, such as legal qualification of criminal offence, security measures, when they are mandatory, and the forfeiture of proceeds of crime, except the manner of forfeiture. A court shall decide on the hearing, set out in Article 285 č of this Act²³, what is not or should not be the object of agreement.

The agreement on sentence contains a type and extent or the length of the sentence to be imposed on a defendant for the criminal offence he committed. The agreed sentence has to be within the limits of prescribed penalty; the imposition of a mitigated sentence and the manner of its enforcement can be proposed in the agreement only under conditions and within limits stipulated in the criminal code. If statutory conditions exist, the parties may agree to impose on a defendant an admonitory sanction instead of penalty. The agreed admonitory sanction must contain all elements which are pursuant to provisions of criminal code required for the imposition of such a sanction.

A public prosecutor can agree with the defendant

about the abandonment of prosecution for those criminal offences which are not included in the guilty plea agreement, only if it is a question of criminal offences under the first and second paragraph of Article 162 of this Act and provided that the injured party gives his consent. A criminal offence in regard of which a prosecution will be abandoned by a prosecutor, must be described in the agreement as accurately as possible, inclusively with the mention of its legal qualification. A consent given by the injured party shall be enclosed to the agreement. The parties can agree in a plea agreement that a defendant, notwithstanding the provisions of the articles 94, 95 and 97 of this Act, can be exempted from the obligation to reimburse all costs or part of the costs of criminal proceedings. In this case costs shall be charged to the budget.

A defendant can also bind himself by a plea agreement to compensate the injured party for the damage caused by a criminal offence, to fulfil a maintenance obligation or to carry out some other task under the first paragraph of Article 162 of this Act.²⁴ This should be done at the latest until the submission of agreement to a court.

A plea agreement concluded between a defendant and public prosecutor shall be decided by the court before which criminal proceedings are conducted either at pre-trial hearing or, if the agreement was concluded later, at the main hearing. When the court decides about the concluded plea agreement, it will consider whether:

1. the agreement is in conformity with the provisions of Articles 450.a, 450.b and 450.c of this Act and
2. the conditions regarding the admission of guilt from the first paragraph of Article 285.c of this Act are met. If a court establishes that whatever requirement from the preceding paragraph does not exist or that a defendant failed to meet an obligation from the fifth paragraph of the preceding article, a court shall render a ruling by which it rejects the agreement and shall continue proceedings as if a defendant declared to not plead guilty. If a court estimates that all requirements are met, it adopts a decision to accept a plea agreement and proceeds with the proceedings as a defendant pleaded guilty to the charge (Article 285.č). There is no appeal against this ruling.²⁵ It is evident that a court is

²² The third and fourth paragraphs of Article 450 a of the ACP

²³ Article 450.b of the CPA

²⁴ Article 450.c of the CPA

²⁵ Article 450.b of the CPA

bound to make a formal examination of plea agreement on the one hand, and on the other, it is limited in regard of criminal sanction to be imposed on the motion of public prosecutor, because it cannot impose a more severe criminal sanction as it was proposed by a public prosecutor.²⁶

The listed provisions of the CPA, brought about by the Amending Act, are in my opinion very problematic and at least for two reasons even unconstitutional. Provisions, by which a judge's decisions are restricted to the formal examination of plea agreement and in respect of sentencing, to the motion of public prosecutor, deprive a judge of his basic function – that is a function of judging; this is by no doubt disputable by itself, because a judge cannot exercise the function for which he was elected. What seems even more problematic is that a public prosecutor and defendant (or his defence counsel) set “sentencing frameworks” in each case, which

implies that they create an ex post facto paradigm for each individual case. Such a conduct necessarily results in the violation of equality before the law, which constitutes one of the basic legal principles of every legal order.

INSTEAD OF CONCLUSION

Courts still render their judgements in the name of the people. It is neither desirable nor convenient if people wonder about or even disdain judgements rendered in their name. In such a case people either do not understand a message given by a judicial branch of government or something might be wrong with this message. The time will show how the mentioned novelties concerning prosecutorial sentencing policy will function in practice and how will be the “bargaining with justice” accepted by people.

Вид Якулин

Политика назначения наказаний в Словении (несоответствие ожидаемого с действительностью).

Рассматриваются вопросы, связанные с политикой назначения наказаний в Словении. По мнению автора политика назначения наказаний в Словении является слишком умеренной и для жертв преступлений даже оскорбительной. Исследуется уголовно-правовая политика, политика назначения наказаний судами и политика исполнения наказаний. Высказываются критические замечания относительно недостатков политики исполнения наказаний, что приводит к нарушению равенства перед законом, которое является наиболее важным из принципов любой правовой системы.

Ключевые слова: Словения, уголовная политика, политика наказаний, политика назначения наказаний, уголовно-правовая политика

Від Якулін

Політика призначення покарань в Словенії (невідповідність між очікуваннями і реальністю).

Розглядаються питання, пов'язані з політикою призначення покарань в Словенії. На думку автора, політика призначення покарань в Словенії є занадто помірною і для жертв злочинів навіть образливою. Досліджується кримінально-правова політика, політика призначення покарань судами і політика виконання покарань. Висловлюються критичні зауваження стосовно недоліків політики виконання покарань, що призводить до порушення рівності перед законом, яка є найбільш важливим з принципів будь-якої правової системи.

Ключові слова: Словенія, кримінальна політика, політика покарань, політика призначення покарань, кримінально-правова політика.